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IN THE

Supreme Court of the United States

October Term, 1963

No. 625

Case No. 17380

BRASWELL MOTOR FREIGHT LINES INC., DENVER-CHICAGO TRUCKING CO., INC., HOPPER TRUCK LINES, ILLINOIS-CALIFORNIA EXPRESS, INC., UNIVERSAL CARLOADING & DISTRIBUTING CO., INC., REPUBLIC CARLOADING & DISTRIBUTING CO., INC., NATIONAL CARLOADING CORPORATION, WESTERN CARLOADING CO., and ACME FAST FREIGHT, INC., corporations,

Petitioners,

vs.

PENSICK & GORDON, INC., a California corporation,

Respondent.

Brief of Respondent Pensick & Gordon, Inc., a California Corporation, in Reply to Petition for Certiorari.

Introduction.

This Respondent has petitioned separately (No. 645, October Term, 1963) in this cause, No. 17380, as well as in its consolidated companion cause, No. 17235, for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit to review that Court's decision in these causes on remand.

Respondent, therefore, concurs in the view that a review of these causes and the opinion on remand by this Court is necessary before further proceedings therein can be had, but for the reasons, and as to the questions, set forth in its own Petition.

Certain questions specified by Petitioners herein are similar or related to certain of those raised by Respondent in its own Petition; others raised herein, however, find no echo in Respondent's Petition. It is the purpose of this Brief to state Respondent's position as to which of these questions do and do not properly require review by this Court.

The subject matter of these causes is one of major concern to the nation's transportation industry, and all parties seem agreed that authoritative resolution at the highest level is vitally necessary; the only area of disagreement in this respect appears to lie in the direction of which questions have been authoritatively settled and which still require determination.

Opinion of the Supreme Court and of the Courts Below.

The Petition correctly summarizes and appends these.

Statutes Involved.

Respondent concurs in Petitioners' statement regarding the pertinence of the cited Sections of the Interstate Commerce Act, Parts II and IV. Respondent disputes, however, the pertinency to the causes of any portion of the Labor Management Relations Act.

Statement of the Case.

Respondent concurs in Petitioners' statement of the case and in its summary of the holding of the Court of Appeals on remand, with the following exception:

Petitioners characterize the action as one charging "unjust and unreasonable discrimination in service giving rise to an action for damages . . ." The gist of the action was the failure of the Defendant carriers and forwarders to provide service to the Plaintiff-Respondent in violation of their obligation to do so, both under statutory and common law sanctions. To the extent that other shippers at the time were treated differently, this may have amounted to a discrimination. However, the damage arose from the failure to provide service to this Respondent-Plaintiff, and it is this refusal and failure which is the gist and basis of the action.

Questions Presented.

In Respondent's view, the questions specifically presented by the within causes and which do necessitate review and resolution by this Court are those set forth by it in its Petition, to wit:

(1) Does a private shipper have the right to seek and obtain redress from motor common carriers for loss or damage suffered as a consequence of the carriers' breach of the duty to render service under the statutory sanctions of the Motor Carrier Act, Sections 216(b) and (d)?

(2) Assuming the existence of such a shipper's right of action, do the Federal Courts have jurisdiction thereof as an action arising under an Act of Congress regulating commerce?

(3) Conversely stated, the foregoing questions may be summarized as follows: Did Congress intend by the Motor Carrier Act that no rights should flow to shippers from the statutory duty to render service imposed by it upon motor common carriers and, at the same time, intend that shippers should continue to enjoy the rights flowing from the common law counterpart of that same duty?

(4) In view of the important Federal policy and statutory considerations attaching to and arising from such common law damage actions, as indicated in the court's opinion on remand, do not the Federal Courts have jurisdiction thereof under 28 U. S. C. A., Sec. 1331, independent of the existence of diversity of citizenship?

(5) If the Federal Courts' jurisdiction to hear and determine such a cause is not barred or preempted because of the fact that the breach of duty was occasioned in part by the existence of a peaceful picket line at the shipper's place of business, is such jurisdiction or the cause of action otherwise affected or modified as a consequence of this fact?

Respondent's position with respect to the questions specified by Petitioners as being presented may be summarized as follows:

Petitioners' Questions 1 and 2[1] have been properly resolved by the Court of Appeals in accord-

[1] 1. Does a post-shipment action for damages predicated upon a claim of a shipper that failure of common carriers by motor vehicle in interstate commerce to render pickup and delivery service across picket lines at shipper's place of business constitutes

ance with appropriate expressions of this Court. There exists, therefore, no conflict with decisions in other Circuits nor with applicable decisions of this Court and, consequently, no need for further determination.

Petitioners' Question 4[2], although a question of major national impact, has likewise been decided by the Court of Appeals, correctly, we submit, and in consonance with applicable principles and decisions of this Court, even though this Court has not decided, with opinion, a case directly on the point.

Petitioners' Questions 3 and 5[3] are indeed tendered by the decision of the Court of Appeals and do necessarily require resolution and determination by this Court before further proceedings can

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unjust and unreasonable discrimination in service survive enactment of the Interstate Commerce Act, Part II?

2. Does a post-shipment action for damages predicated upon a claim of a shipper that failure of freight forwarders in interstate commerce to render pickup and delivery service across picket lines at shipper's place of business constitutes unjust and unreasonable discrimination in service survive enactment of the Interstate Commerce Act, Part IV?

[2] 4. Is jurisdiction of the District Court in the particular controversy pre-empted by that of the National Labor Relation Board, under the Labor Management Relations Act, 29 U. S. C. A., §§141 *et seq*?

[3] 3. Assuming jurisdiction of the District Court over the action, may the District Court seek and the Interstate Commerce Commission give an advisory opinion as to whether the carrier's conduct in failing to provide pickup and delivery service across picket lines constitutes an unjust and unreasonable discrimination in service?

5. Assuming jurisdiction of the United States District Court is not so pre-empted, may the District Court seek and the National Labor Relations Board give an advisory opinion as to whether any activity of any person pertinent to the determination of the action is protected or prohibited by the National Labor Relations Act, as amended?

be had for the reasons expressed not only in this Petition but also in Respondent's Petition. In this latter connection, Respondent views these questions as embraced within the ambit of its own Question 5, above.

ARGUMENT.

A. The Holding of the Court of Appeals That the Respondent's Common Law Cause of Action Survived the Enactment of the Motor Carrier Act Is in Perfect Consonance With the Applicable Decisions of This Court.

This action is based, in part, upon the shipper's historic right of action at common law to recover damages against common carriers who fail or refuse to provide him service, reasonably requested, in violation of their duty to do so. From the outset, Petitioners have argued that this Court's decision in *T.I.M.E. Inc. v. United States* (1959), 359 U. S. 464, 3 L. Ed. 2d 952, 79 S. Ct. 904 (herein simply referred to as *T.I.M.E., Inc.*), applied to and governed these causes and necessitated, therefore, a holding that the common law cause of action did not survive the enactment of the Motor Carrier Act (Interstate Commerce Act, Part II) and, by implication, the pertinent portions of the Freight Forwarder Act (Interstate Commerce Act, Part IV).

Respondent has, with equal vigor, consistently argued that the rule of *T.I.M.E., Inc.* was inapposite to these causes.

In its original opinion herein, the Court of Appeals agreed that *T.I.M.E., Inc.* was controlling and that the common law cause of action had been extinguished.

Pensick & Gordon, Inc. v. California Motor Express, et al. (9 Cir. 1962); 302 F. 2d 391.

In its earlier Petition, Respondent urged its original position upon this Court and cited the case of *Hewitt-Robins, Inc. v. Eastern Freight-Ways, Inc.* then pending before it and later the subject of this Court's opinion reported at 371 U. S. 84, 9 L. Ed. 2d 142, 83 S. Ct. 157 (1962) (herein referred to simply as *Hewitt-Robins, Inc.*).

In its earlier decision herein, this Court granted this Respondent's Petition for Certiorari and remanded to the Court of Appeals for further consideration in the light of that same decision, *Hewitt-Robins, Inc. (Pensick & Gordon, Inc. v. California Motor Express, et al.* (1962), 371 U. S. 184, 9 L. Ed. 2d 227, 83 S. Ct. 265).

This Court could give no clearer indication, we submit, of its view that Respondent was correct in the contention which it originally put forth and that the position of these Petitioners as well as the Court of Appeals in its original holding were incorrect and inappropriate. Had this Court thought otherwise, there would have been no occasion to disturb the Court of Appeals' original holding.

Manifestly, then, this Court's earlier decision in these causes sustains Respondent's contention that the common law cause of action for damages *did* survive enactment of the Motor Carrier Act at the same time that it rules out Respondent's contention that *T.I.M.E., Inc.* is controlling. The Court of Appeals, in its opinion on remand, recognized this and held accordingly.

The decision of the Court of Appeals, on remand, is thus in conflict with no decision of this Court, but is,

quite the contrary, in perfect consonance with the one most clearly applicable decision, to wit, *Hewitt-Robins, Inc.*

Since there exists no conflict between the Court of Appeals' decision on this point and the applicable decision of this Court, there is, we submit, no occasion for this Court to reconsider the survival of the common law action (Petitioners' Questions 1 and 2) merely to confirm the Court of Appeals' holding thereon and reconfirm its own views earlier expressed.

While there are several questions presented by the decision on remand and compelling reasons for their review by this Court, Petitioners' Questions 1 and 2 are not among them.

B. The Holding of the Court of Appeals on Remand That the Jurisdiction of the District Court Has Not Been Pre-Empted by That of the National Labor Relations Board Is Perfectly Consonant With Applicable Decisions of This Court.

The pleadings before the District Court in these causes disclosed that the refusal to provide service, of which Plaintiff complained was occasioned, at least in part, by the existence at Plaintiff's place of business of a peaceful picket line and by the consequent refusal of Defendants' drivers to cross this line to render pick up and delivery service. Petitioners have urged throughout that this mere fact operated to oust the District Court of any jurisdiction which it might otherwise have on the theory that the controversy "necessarily raises issues the National Labor Relations Board [hereinafter referred to simply as Board] . . . has exclusive jurisdiction to resolve in the first instance."

Petition, p. 18. In support of this proposition, certain decisions of this Court, many of them *per curiam*, have been cited by Petitioners

General Drivers, etc. v. American Tobacco Co., 348 U. S. 978, 99 L. Ed. 702, 75 S. Ct. 659 (1959) (Reversing 264 S. W. 2d 250 (Ky.) (1953));

Teamsters v. Kerrigan Iron Works, 353 U. S. 968, 1 L. Ed. 2d 1133, 77 S. Ct. 1055 (1957);

McCrary et al. v. Aladdin Radio Industries, Inc., 355 U. S. 8, 2 L. Ed. 2d 22, 78 S. Ct. 12 (1957) (Remanding 298 S. W. 2d 770 (Tenn.) (1956));

Bogle v. Jakes Foundry Co., 362 U. S. 401, 4 L. Ed. 2d 864, 80 S. Ct. 812 (1960) (Reversing 329 S. W. 2d 364 (Tenn.) (1959));

San Diego Building Trades Council v. Garmon, 359 U. S. 236, 3 L. Ed. 775, 79 S. Ct. 773 (1959);

Weber v. Anheuser Busch, 348 U. S. 468, 99 L. Ed. 2d 952, 79 S. Ct. 904 (1955);

Garner v. Teamsters C. & H. Local Union No. 77, 346 U. S. 485, 98 L. Ed. 228, 74 S. Ct. 161 (1953).

As with *T.I.M.E., Inc.* these cases are inapposite, and the Court of Appeals so held, giving the following reasons: This is an action by a shipper against carrier entities for damages; no union is a party; no union has intervened; no unfair labor practice is alleged; no injunction was issued or was sought to control the conduct of any union or employer.

On the other hand, the jurisdiction of the District Court to hear and determine an action for damages, even one directly involving unfair labor practices, is the subject of specific statutory sanction. Labor Management Relations Act; Section 303 (Labor Management Relations Act of 1947, as amended by Public Law 86-257, 1959; 29 U. S. C. Sec. 187). Further, Court jurisdiction in the premises has recently received specific reconfirmation by this Court. *Smith v. The Evening News Association* (1962), 371 U. S. 195, 9 L. Ed. 2d 246, 83 S. Ct. 267.

Thus, while this Court has not expressed itself in any opinion deciding a case squarely on the point, which is one of national impact and importance, the decision of the Court of Appeals on remand is, nevertheless, in perfect consonance with the policy of the statute as interpreted and expounded in those decisions of this Court most nearly analogous. Accordingly, there exists no occasion for the granting of *certiorari* as to this particular question.

C. The Holding of the Court of Appeals That the District Court Can Refer or Require Reference to the Interstate Commerce Commission or the National Labor Relations Board or Both for Such Aid as May Be Necessary or Useful to the Court's Ultimate Decision Presents Important Questions of Law Which Should Be Settled by This Court.

Respondent concurs with the view of Petitioners that the Court of Appeals' holding that the District Court, in further proceedings below, can refer or require reference to the Interstate Commerce Commission or the Board for such aid as may be necessary or useful to the

Court's ultimate decision is one which presents questions of first instance and of the utmost importance and which should be reviewed and determined by this Court, both for the reasons set forth in this Petition and in the Petition heretofore filed by this Respondent in the consolidated causes.

Conclusion.

For the reasons set forth above, as well as for the reasons set forth in its own separate Petition, Respondent believes it imperative that this Court grant a Writ of Certiorari in these causes. However, for the reasons above expressed, Respondent urges that Petitioners' questions pertaining to the existence or survival of the common law remedy and to the preemption of jurisdiction by the Board should be excluded from the scope of determination prescribed by the Writ.

Respectfully submitted.

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By CARL M. GOULD,
Attorneys for Petitioner.